LOKMAN SULAKON

v.

PP

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL APPLICATION NO: 44-7-2001]
14 FEBRUARY 2003

CRIMINAL PROCEDURE: *Appeal - Petition of appeal - Application for extension of time - Failure to file within time prescribed - Whether counsel's delay to file reasonably accounted for - Whether any merits in appeal - Criminal Procedure Code, s. 310*

This was an application under s. 310 of the Criminal Procedure Code, by the accused ('applicant') for extension of time to file his petition of appeal. The facts were that the applicant was found guilty of an offence under s. 376 of the Penal Code (the rape of a 17 year old girl) and sentenced to a term of imprisonment of 15 years and to six strokes of the rotan. Counsel for the applicant submitted that they were retained to replace the former solicitors after the lodgement of the notice of appeal and were not instructed within time as they were waiting for instructions from the applicant. Hence there was a delay. Furthermore, the counsel contended that there was merit in the appeal, submitting that there was no penetration and that the applicant was impotent.

Held:

[1] The present solicitors were retained after the former solicitors lodged the notice of appeal, thus the present solicitors must have been instructed to proceed with the appeal. On 4 June 2002 (the alleged date that the present solicitors received the papers from the former solicitors), it was still within time to lodge the petition of appeal. Yet this application was lodged only after the time for the lodgement of the petition of the appeal had lapsed for more than four and a half months. The delay in the lodgement of the petition of appeal was not reasonably accounted for. (pp 323 h-i & 324 a-d)

[2] Although it was contended that the applicant was impotent, the prosecution adduced clear evidence that the sexual organ of the applicant was unquestionably capable of erection. Apart from the testimony of the complainant that she saw the applicant's penis in an erect state, there was the unchallenged testimony of a medical assistant that a semen specimen was obtained from the applicant. A semen specimen could only be obtained

only if there was ejaculation, and ejaculation could not reasonably come about with erection. That the applicant was capable of the sex act was proved beyond doubt. (p 325 f-g)

[3] Since there was nothing wrong with the conviction, substantial justice will not be done if this application was allowed. (p 325 h)

[Application dismissed.]

Case(s) referred to:
Ishak Hj Shaari v. PP [1997] 5 MLJ 28 HC ***(refd)***
Johnny Lim Chin Teik v. PP [1998] 12 MLJU 1 ***(refd)***
Jumari Mohamed v. PP [1982] 1 MLJ 282 ***(refd)***
Masnelan Pakpahan v. PP [1989] 2 CLJ 452; [1989] 2 CLJ (Rep) 112 HC ***(refd)***
PP v. Sundaravelu [1967] 1 MLJ 79 ***(refd)***
Saw Yew Choy v. PP [2000] 5 CLJ 288 HC ***(refd)***
Veerasingham v. PP [1958] MLJ 76 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 305, 306, 307(1), (4), (9), 310
Penal Code, ss. 354, 376

Other source(s) referred to:
Jiva Nawes v. PP, 5 Mallal's Digest, 4th edn 1997, Reissue, para 497

For the applicant - Hj Abdul Rahim Alladad; M/s A Rahim & Co
For the respondent - Haslinda Abu Bakar, A-G's Chambers

Reported by Suhainah Wahiduddin

JUDGMENT

Jeffrey Tan J:
This is an application (encl. 3 dated 24 October 2002) under s. 310 of the Criminal Procedure Code, by the accused (applicant) for extension of time to file his petition of appeal, which should have been filed by or before 7 June 2002, out of time.

The background facts are as follows. On 23 January 2002 and after a full trial, the applicant was found guilty of an offence under s. 376 of the Penal Code (the rape of a girl of 17 years) and sentenced to a term of imprisonment of 15 years and to 6 strokes of the rotan, by the Batu Pahat Sessions Court. There is no dispute that the notice of appeal against conviction and sentence was lodged within the time stipulated in s. 307(1) of the Criminal Procedure Code. There is also no dispute that the petition of appeal, which both sides agree should be filed in June 2002, has not been lodged.

According to Tuan Haji Abdul Rahim bin Alladad, counsel for the applicant, the grounds of decision was served on 29 May 2002, and that therefore the petition of appeal should have been filed by or before 7 June 2002. And according to Tuan Haji Abdul Rahim, the petition of appeal was not lodged within time, as he could not contact the wife and mother of the applicant to obtain their further instructions. But in the affidavit that he affirmed in support of this application, Tuan Haji Abdul Rahim deposed that his legal firm was waiting for instructions from the applicant or members of the applicant's family, that instructions from members of the applicant's family were given very late, and that he proceeded to the Simpang Rengam Prison to interview the applicant after he had received his instructions from the members of the applicant's family to proceed with the appeal. Be that as it may, Tuan Haji Abdul Rahim contended that there are merits in the appeal. A proposed Petition of Appeal was lodged on 13 December 2002, but the only submission made by learned counsel in connection with the merits of the appeal was "There was no penetration. The complainant was not sure if there was actual penetration. There was no evidence of the presence of spermatozoa". Learned counsel argued that the applicant was only guilty of an offence under s. 354 of the Penal Code. "The applicant had testified that he was impotent." Lastly, learned counsel contended that the evidence of the complainant was inconsistent.

Contending to the contrary, Haslinda bte Abu Bakar, the learned DDP, submitted that there are no merits in the appeal. "Semen was obtained. If there was no erection, there could not be any ejaculation ... The complainant testified that both her hands were held by both hands of the accused. At that moment, both parties were close (to each other) and something entered. There was only one thing that could have entered (the vagina of the complainant)."

Section 307(1) provides "... subject to the provisions of s. 305 and 306 any person who is dissatisfied with any judgment, sentence or other order ... in a criminal matter ... may prefer an appeal ... against such judgment, sentence or order ... by lodging, within 10 days from the time of such judgment, sentence or order being passed or made ... a notice of appeal in triplicate addressed to the High Court ...". Section 307(4) provides "Within 10 days after the copy of the grounds of decision has been served ... the appellant shall lodge ... a petition of appeal in triplicate addressed to the High Court". Section 307(9) of the CPC provides "if an petition of appeal is not lodged within the time prescribed ... the appeal shall be deemed to have been withdrawn and the trial court shall enforce its sentence or order if any stay of execution has been granted, but nothing herein shall be deemed to limit or restrict the powers conferred upon a judge by s. 310". And s. 310 provides "A judge may, on the application of any person desirous of appealing who may be barred from doing so upon the ground of his not having observed some formality or some

requirement of the Code, permit an appeal upon such terms and with such directions to the magistrate and to the parties as such judge shall consider desirable, in order that substantial justice may be done.

The powers and principles governing the grant of an extension of time to lodge a petition of appeal were expounded in *Veerasingham v. PP* [1958] MLJ 76, where at p. 79 Thomson CJ (as he then was) said:

> The only fetter which section 310 places upon the exercise of the discretion which it gives to the judge is that it shall be exercised 'in order that substantial justice may be done'. Clearly, to exercise his discretion properly the judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the Original Petition of Appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to the Original Petition of Appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of Notice to be given. And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter. It may be helpful to look at what has been done in some other case by some other judge but if he does, he must be careful to look at what that other judge has done merely as an illustration and not as laying down any judicial precedent

A similar opinion was expressed in *Masnelan Pakpahan v. PP* [1989] 2 CLJ 452; [1989] 2 CLJ (Rep) 112, where Mohd Dzaiddin J (as he then was) held:

> ... the underlying principle of s. 310 of the Criminal Procedure Code is to allow a judge to exercise his unfettered discretion to see that substantial justice may be done in the matter. In the final analysis, the exercise of the discretion depends on the facts and circumstances of each case. In the present application, it is deposed that there are strong grounds of appeal on the merits and in law and that the failure of the solicitors to file the petition of appeal in time was due to inadvertence. In my judgment, it is insufficient for the deponent to state that he believes there are strong grounds in the appeal on the merits and in law without at least mentioning what the grounds are and the law involved. He ought to have exhibited to his affidavit a proposed petition of appeal.

"... emphasis is laid on the phrase 'in order that substantial justice may be done in the matter'" (*PP v. Sundaravelu* [1967] 1 MLJ 79, per Raja Azlan Shah J, as HRH then was).

Even so, an extension of time to file a petition of appeal is not granted as a matter of course *Jumari bin Mohamed v. PP* [1982] 1 MLJ 282; *Johnny Lim Chin Teik v. PP* [1998] 12 MLJU 1; *Jiva anak Nawes v. PP* 5 Mallal's Digest 4th edn 1997 Reissue para 497). Extension of time to lodge the petition of appeal out of time was refused in *Jumari bin Mohamed* (where it was held by Mohamed Azmi J (as he then was) that the reasons put forward for the

petition of appeal not being lodged in time "are too flimsy and frivolous" and that "there is nothing on record to show that the applicant's conviction is wrongful"), in Johnny Lim (where it was held by KC Vohrah J (as he then was) that the affidavit of the applicant "does not show anywhere why the conviction was wrongly made and that there are merits in the appeal), in *Masnelan Pakpahan* (where it was held by Mohd Dzaiddin J (as he then was) that "it is insufficient for the deponent to state that he believes that there are strong grounds in the appeal without at least mentioning what the grounds are and the law involved"), in *Saw Yew Choy v. PP* [2000] 5 CLJ 288 (where it was held by Kang Hwee Gee J that the onus is solely upon the applicant to satisfy the court that 'substantial justice' requires the grant of his application, that there is contumelious delay on the part of the applicant to pursue his appeal, and that there is hardly any merit in the appeal), in *Jiva anak Nawes* (where it was held by Chong Siew Fai J (as he then was) that the reason put forward for not lodging the petition of appeal within time is not satisfactory, and that there is no indication in the case that the conviction was wrongful).

A more liberal approach was adopted in *Ishak bin Hj Shaari v. PP* [1997] 5 MLJ 28, where it was held by Suriyadi J, that the court's powers under s. 310 "are purely discretionary and no hard and fast rule should be laid down for its exercise except for the sole purpose of meting out substantial justice" and that "the inadvertence and incompetence of solicitors could be a ground of consideration for a judge when exercising his discretion in allowing or disallowing the application". Suffice it to say that extension of time may be granted on a solitary satisfactory ground (see *Sundaravelu*, where the petition of appeal was posted to the wrong place and it was held that it was a proper case to exercise the discretion in favour of the applicant; see also *Veerasingam*, where it was held that there it would be an error to lay down any principle that an applicant must satisfy each of two conditions, firstly that circumstances exists which justify an extension of time and secondly that he has a reasonable prospect of success on the appeal on the matters which he is desirous of raising).

But as was said by Thompson in *Veerasingam*, what had been done in some other case by some other judge should be regarded "merely as an illustration and not as laying down any judicial precedent. ..".

In the instant case, the reason given for the petition of appeal not being lodged within time is that the present solicitors were not instructed within time. But unfortunately, that reason is simply not good enough. The notice of appeal was lodged by the former solicitors. Hence, the present solicitors must have been retained after lodgement of the notice of appeal. And since the present solicitors must have been retained after lodgement of the notice of appeal, it must have worked out that when they were retained, the present solicitors must have been instructed to proceed with the appeal, for reasonably it could not be imagined

that the applicant would discharge his former solicitors who had lodged his notice of appeal but then retain the present solicitors without leaving them instructions to proceed with his appeal. If that was the case, then what was the logical reason for the applicant to retain another firm of solicitors and incur additional legal cost? It just does not stand to reason that the applicant would not have not instructed the present solicitors to proceed with the appeal. Moreover, as observed in *Jiva anak Nawes*, "the preparation of the petition of appeal is a technical matter which normally does not require the assistance of an accused". On 4 June 2002 (the alleged date that the present solicitors received the papers from the former solicitors), it was still within time to lodge the petition of appeal. If indeed the petition of appeal could not be prepared or lodged in time, then there ought at the very least to have been a prompt and speedy application for extension of time. The applicant could be reached at the Simpang Renggam Prison. Yet this application was lodged only after the time for the lodgement of the petition of the appeal had lapsed for more than 4 1/2 months.

This is hardly a case in which the delay in the lodgement of the petition of appeal was reasonably accounted for. And more importantly, this is not a case in which there are merits in the appeal. It was argued that there was no penetration, and that the applicant was impotent. It was argued that the complainant was not sure if there was actual penetration, and in connection with that argument learned counsel pointed to the last line of p. 42 of the proposed appeal record. Indeed at the last line of p. 42, the complainant answered "Ya, saya tak pasti" to the counsel's question "Kamu tidak pasti kemaluan OKT masuk kemaluan kamu". But with respect, each answer of the complainant should be read in the context of her evidence as a whole. The clear purport and effect of the total evidence of the complainant was that there was penetration. When the complainant answered "Ya, saya tak pasti", she meant to say that she was not sure if there was any penetration prior to the insertion of the applicant's finger into her vagina. But the complainant clearly testified that there was penetration, as the answer "Ya, saya tak pasti" was given in the following context:

> Bila seluar dalam saya tanggal, OKT tonjolkan jari pada kemaluan saya. Saya terkencing. Tak betul saya bangun. Kemaluan saya tidak dimasuk apa-apa. Tonjol itu masuk. OKT bangun and acukan kemaluan dia ke maluan saya. Sebelum OKT jolok kemaluan saya dengan jari, kemaluan saya tidak di masuki apa-apa.
>
> S: Kamu tidak pasti kemaluan OKT masuk kemaluan kamu?
>
> J: Ya saya tak pasti.

S: lepas tangan kamu dilepas, kaki dikangkang dan dia rapat badannya ke badan awak dia hanya letak kemaluan tepi kemaluan kamu, hanya jari dimasuk ke dalam kemaluan awak?

J: Kemaluan dia masuk. Saya tidak setuju. Saya tidak nampak kemaluan dia. Maksud saya ada sedikit masuk, kemudian dia sentuh kemaluan saya. Saya rasa walaupun tidak nampak. Saya rasa semasa sentuh kemaluan saya saiz kemaluan OKT masih sama dengan saya nampak terdahulu lebih besar dari ibu jari peguambela.

In fact, it was the consistent testimony of the complainant that there was penetration (see pp. 35, 36, 43, and 47 of the proposed appeal record). It was correctly pointed out by the learned DPP, that it was the testimony of the complainant that both her hands were held by both hands of the applicant (see line 3 p. 35 and line 2 p. 47 of the proposed appeal record). It was the testimony of the complainant that when her hands were held by both hands of the applicant that the applicant was then on top of her, and that at that point in time she felt "kemaluan OKT masuk kerana kemaluan dia dan kemaluan saya dirapatkan. Kedua tangannya pegang tangan saya. Kaki saya cuba di kangkangkan dengan gunakan kaki dia. Kemudian dia masukkan, masuk keluar. Ada beza kemasukan kemaluan dari jari. Jari kecil – kemaluan besar dan keras." That there was penetration could not have been related any clearer by the complainant. Penetration was also corroborated by the medical evidence. So how could it be argued that there was no evidence of penetration?

It was contended that the applicant was impotent. But the prosecution adduced clear evidence that the sexual organ of the applicant was unquestionably capable of erection. For apart from the testimony of the complainant that she saw the penis of the application in an erect state, there was the unchallenged testimony of a medical assistant (SP6 – then attached to the Kluang Hospital), that a semen specimen was obtained from the applicant on 29 May 1998. Needless to say, a semen specimen could be obtained only if there was ejaculation, and ejaculation could not reasonably come about without erection. That the applicant was capable of the sex act was proved beyond doubt. And that fact was affirmed by the applicant himself who stated in his mitigation that he has a wife and child (see p. 70 of the proposed appeal record).

It was suggested in *Veerasingam* at p. 78 by Thompson CJ that "... substantial justice is done when a rightful conviction is upheld and a wrongful one is quashed". Since there is nothing wrong with the conviction, substantial justice will not be done if this application is allowed. Accordingly, and having regard to all the circumstances of this particular case and in exercise of the discretion conferred by s. 310 of the CPC, this application is dismissed.